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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HOMER CUMMINGS,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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Your petitioners, the United States of America ex rel. Murray Brensilber and Emanuel Thebner, and Murray Brensilber and Emanuel Thebner in their own behalf, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on November 23, 1942, affirming the judgment of the United

States District Court for the Southern District of New York.

Opinion Below.

The district court filed no opinion. The opinion of the circuit court of appeals (R. 267-269) is reported in 131 F. 2d 545.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on November 23, 1942 (R. 270). The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether, in an action on behalf of the United States under R. S. secs. 3490 and 5438 to recover damages and penalties on account of the presentation for approval and payment of fraudulent claims against the United States, where the complaint relies on admittedly unlawful agreements between an American and a German corporation, the two main competitors in the industry, allotting to the American company all of the business of the United States Government, and where the record before the court shows that under such agreements the German corporation, when invited by the United States to make a bid, was required to submit, and did in fact submit excessive prices (so-called "protective offers") fixed by the American corporation—whether upon such facts, a summary judgment for the American corporation may properly be sustained on the ground that the complaint and the unlawful agreements show no false representations in deceit of the United States.

Statutes Involved.

The statutes involved are Revised Statutes, sections 3490-3493 and 5438. They appear in the appendix, pp. 26-28

Statement.

On December 17, 1941, petitioners, on behalf of the United States and as well in their own behalf brought this action in the Southern District of New York against the respondents to recover the penalties and double damages provided by R. S. sec. 3490 resulting from acts in furtherance of a conspiracy by defendants to defraud the United States in violation of R. S. sec. 5438.[1]

Upon motion by Bausch & Lomb and the individual respondents, officers of Bausch & Lomb (R. 13), and supporting affidavits (R. 17, 32, 33, 34) an order was entered by the district court directing petitioners to show cause why an order should not be entered dismissing the complaint for improper venue and for failure to state a cause of action and granting summary judgment (R. 11-12). Carl Zeiss, Inc., filed notice of similar motion (R. 39) and supporting affidavit (R. 41-45).

Thereupon, on January 13, 1942 an amended complaint (R. 78-85) was served upon counsel for Bausch & Lomb and the individual defendants (R. 50) and on counsel for Zeiss (R. 61).

Upon affidavits of counsel for respondents (R. 49, 60) the district court on January 14, 1942, entered new orders directing petitioners to show cause why an order should not be entered (1) striking the original complaint as sham and frivolous (2) determining the amended complaint is a nullity and denying leave to file the amended complaint or (3) dismissing the action and amended complaint for improper venue and for failure to state a cause of action and granting summary judgment (R. 46, 47). These orders also stayed petitioners from taking any further proceedings in this action until final decision upon the motion (R. 48, 59).

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[1] This action was filed about 18 months after the entry on July 9, 1940 of a consent decree in an injunction suit brought by the United States

Petitioners filed affidavits in opposition to the rule (R. 64, 77) and by reference (R. 65) incorporated therein the federal indictment (R. 86) the Government's Bill of Particulars (R. 112, 194)—which included the agreements of Bausch & Lomb with Carl Zeiss of Jena (R. 145, 151, 153, 157)—and also the Government's complaint in equity and the consent decree entered thereon (R. 212, 243).

After hearing January 16, 1942, the court entered its order that the amended complaint is a nullity and denying petitioners leave to amend the complaint in accordance with the proposed amended complaint on the ground that the amended complaint does not state a cause of action (R. 254-258). The original complaint was ordered dismissed and summary judgment entered for respondents (R. 259, 261).

On appeal the circuit court of appeals held (R. 269):

> In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a) to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset.

Accordingly the judgment of the district court was affirmed.

The salient facts may be briefly set out in chronological order:

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under the Anti-trust laws (R. 243-248). In March, 1940 the respondents were indicted in two counts, (1) for conspiracy in violation of the Sherman Act and (2) for conspiracy in violation of Section 73 of the Wilson Act (R. 86-109). On pleas of nolo contendere by Bausch & Lomb and its officers, the individual defendants, judgment was entered May 27, 1940 against each imposing fine on each of them of $5,000 on each count. Later on March 5, 1941, on a similar plea, Carl Zeiss, Inc., was fined $1,000 (R. 110-111).

The illegal combination.—On April 28, 1921, Bausch & Lomb entered into a 25-year agreement with Carl Zeiss of Jena, Germany. This contract provided generally for payment by Bausch & Lomb to Zeiss of royalties—stated to be in consideration for patent licenses and technical assistance—on all sales of military optical instruments by Bausch & Lomb (R. 146). The provisions here important, however, were: Paragraph 3, relating to military optical instruments, by which Bausch & Lomb agreed not to sell such instruments to countries other than the United States and Carl Zeiss agreed "not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution (R. 147).[2] Paragraph 9 provided that the parties "agree to keep the foregoing agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances" (R. 149).

On June 27, 1925, paragraph 3 of the agreement was amended by adding an implementation provision (R. 151-152):

> *In the case of inquiries, received* by Bausch & Lomb from authorities outside of the United States of America, *by Carl Zeiss from the authorities of the*

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[2] Carl Zeiss is a corporation or association existing under the laws of Germany and having its principal place of business at Jena, Germany, where, among other things, it manufactures military optical instruments. "For a number of years, including the three years next preceding the date of the return of this indictment, Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of Carl Zeiss, Inc., a corporation organized on or about December 11th, 1925, and existing by virtue of the laws of the State of New York, which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss" (R. 87-88).

> *United States,* one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. (Emphasis supplied)

A further amendment on October 28, 1925, to add further modifications as to protective offers when made by Bausch & Lomb, left the above-quoted provision in full effect (R. 153-156).

Later, on November 26 and December 24, 1926 this agreement as modified was supplanted by a new form of contract which narrowed the provisions of Paragraph 3 to mere agreement for an exclusive patent license (R. 157, 159). However, Paragraph 6 of this new agreement contained the following language (R. 159):

> In the production and sale of *nonmilitary* articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. *They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line* (Emphasis supplied).

The indictment.—In March, 1940, the respondents and Carl Zeiss were indicted in two counts for conspiracy in violation of the Sherman Anti-trust Act and in violation of section 73 of the Wilson Act (R. 86-109). This indictment charged that notwithstanding the changes in the form of the supplemented 1921 agreement effectuated by the 1926 agreement, Bausch & Lomb and Zeiss "intended and

continued to carry out" the terms of Paragraph 3 and 9 of the 1921 agreement as supplemented in 1925 (R. 97, 105). Included in the allegations of acts in furtherance of the conspiracy were charges that Zeiss has refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented and Zeiss "on various occasions subsequent to June 27, 1925 has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss" (R. 98). And the indictment concluded that as a result the respondents "have exacted arbitrary, artificial, unreasonable and non-competitive prices from purchasers of military optical instruments including the Government of the United States" (R. 99). Pleas of *nolo contendere* were entered for all the respondents except Carl Zeiss. The Bausch & Lomb defendants were fined $5,000 on each of the two counts on May 27, 1940, and Carl Zeiss, Inc. was fined $1,000 on March 5, 1941 (R. 110).

The action for injunction.—On July 8, 1940, the United States filed its complaint for injunction against the Bausch & Lomb defendants relying on the same contracts and again alleging that "Notwithstanding this change [in 1926] in the form of the April 28, 1921, agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of paragraphs 3 and 9 of the April 28, 1921, agreement as supplemented in 1925" (R. 212, 223). On July 9, 1940, a consent decree was entered (R. 243-248) enjoining the defendants, among other things, from conspiring with other manufacturers "To fix or maintain prices, quotations or terms of sale of military optical instruments", "To agree upon the prices which any other manufacturer of military optical instruments shall charge for

such instruments", "To make bids or price quotations on military optical instruments at the request of any other manufacturer of such instruments" (R. 245).

Action by petitioners.—The United States for a subsequent period of 18 months took no steps to recover damages resulting from misrepresentations in connection with purchases made during the continuance of the conspiracy. Finally, on December 17, 1941, petitioners filed their original complaint which alleged that respondents with others had been engaged in a conspiracy in the case of sales made to the United States Government to fix, maintain and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments (R. 1, 3-10). Through inadvertence, it was alleged that the unlawful combination required that *neither* of the parties sell to the United States without the consent of the other and that sales made by *either* of them to the Government would contain a markup of 20% to be paid over to the other party (R. 5-6).

Respondents obtained an order to show cause why the complaint should not be dismissed and summary judgment be entered for defendants (R. 11-12).

The amended complaint.—Petitioners thereupon filed an amended complaint which alleged that Bausch & Lomb and Carl Zeiss, Jena, Germany from April 28, 1921 and Carl Zeiss, Inc., from its incorporation in 1925 and the individual defendants from the time they became officers or directors of Bausch & Lomb have up until March 29, 1940 been engaged in a conspiracy (a) to divide the world market for military optical instruments, the exclusive territory of Bausch & Lomb to be the United States and that of Zeiss to be the rest of the world; (b) not to sell in the other's territory without prior consent; and (c) in the case of sales made by consent to fix, maintain and control arbitrary,

artificial and unreasonable prices and terms of sale [3] (R. 78, 80-81). The amended complaint further alleged that both Bausch & Lomb and Carl Zeiss, Jena, have delivered military optical instruments to the United States at arbitrary, artificial and unreasonable and non-competitive prices and Bausch & Lomb have received payment for such instruments (R. 81-82). Bausch & Lomb at various times submitted to the Government bids for contracts for the manufacture and sale of military optical instruments to be used by the United States. "Such bids were at prices that pretended to be and were represented to be, and which the Government of the United States and its authorized representatives believed to be, the normal, prevailing and competitive prices of such military optical instruments. Such bids, were, in fact, not the normal, prevailing and competitive prices therefor, but were in excess of the normal, prevailing and competitive prices for such military optical instruments" (R. 82). The authorized officers of the United States were without knowledge of the conspiracy and accepted various bids submitted by Bausch & Lomb (R. 82).

The amended complaint also contains the allegation that "the defendants, other than Carl Zeiss, Inc., * * * have presented for payment and approval to various officers of the * * * United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States. * * * the defendants knew that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy, combination and agreements between the defend-

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[3] It was also alleged that Bausch & Lomb agreed to pay to Zeiss a royalty on the gross sales price of each instrument sold to the United States regardless of whether such equipment was covered in whole or part by Zeiss patents (R. 81).

ants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied" (R. 83).

Proceedings in the district court.—The affidavit of counsel in support of a second order to show cause dated January 14, (R. 49), asserts that the amended complaint should be dismissed and summary judgment granted on the grounds set forth in the attached order to show cause (R. 52). That order founds the motion for summary judgment on the affidavits annexed to the order to show cause dated January 6, 1942, and the attached affidavit of counsel (R. 47).

The affidavit of Herbert Eisenhart, President of Bausch & Lomb—and the only affidavits which purports to set out facts with respect to the conspiracy—incorporates by reference the Government's indictment and equity complaint (R. 23, 24). The equity complaint by reference (R. 221-223) includes the contract of Bausch & Lomb with Carl Zeiss, Jena, dated April 28, 1921 (R. 228) together with its supplements of June 27, 1925 (R. 233) and October 28, 1925 (R. 235), and the contract of November 26-December 24, 1926 (R. 238). This affidavit upon which the second motion for dismissal and summary judgment is based, is admitted to have brought before the court the complete records of the Government's anti-trust proceedings (R. 251), which of course includes the bills of particulars to the indictment (R. 112-208).

After hearing, the trial court entered its order that the amended complaint is a nullity and denying leave to amend in accordance with the proposed amended complaint, on the ground that it does not state a cause of action. Without ruling on the motion to dismiss on the ground that venue was improperly laid, the trial court entered summary judgment for the respondents (R. 259-262).

Decision of the circuit court of appeals.—The appellate court passed the question whether petitioners did not have an unconditional right to amend under Rule 15(a)[4], and conceded that the court was "perhaps wrong" in holding that the amended complaint did not state a cause of action. But the court held (R. 269):

> The motion for summary judgment dismissing both [original and amended complaint] was right because it appears beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere, and that this in turn rested upon the contracts.

Purporting to distinguish the factual situation in *United States ex rel Marcus* v. *Hess*, 127 F. 2d 233, the court said (R. 268):

> In the case at bar the contracts between Bausch & Lomb and Carl Zeiss of Jena (strictly only the second one is relevant) unlawfully gave Bausch & Lomb an advan-

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[4] Rule 15 (a), Federal Rules of Civil Procedure, provides:

"Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served • • •"

In 1 Moore, Federal Practice, p. 428, it is stated: "A motion is not a pleading. It is defined as 'an application to the court for an order'".

Since a motion is not a pleading, a motion for summary judgment cannot be a "responsive pleading". Therefore petitioners were entitled to amend as of right.

Rule 7 (a) provides:

"Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. *No other pleading shall be allowed,* except that the court may order a reply to an answer or a third-party answer." (Emphasis supplied.)

Rule 12 (b) also distinguishes between a pleading and a motion. Cf. *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453, 454 (C. C. A. 1); contra *Triangle Conduit & Cable Co.* v. *National Elec. P. Corp.*, 38 F. Supp. 533 (Del.) rev'd on other grounds 125 F. 2d 1008.

> tage without which we will assume — though that is not certain — they would not have secured their contracts with the United States. That was a wrong, but it was not a "fraud" unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market. Plainly a bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is "normal" or "unreasonable", or "competitive". If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been, but not because by bidding he has said anything about competition.

Accordingly the circuit court of appeals entered its order for mandate affirming the judgment of the district court (R. 270).

Specification of Errors to Be Urged.

The circuit court of appeals erred:

1. In holding that the acts of the members in furtherance of, and pursuant to, their unlawful combination to allot all United States Government business to the American corporation involved no representations to the United States upon which to found a charge of fraud in the procuring of contracts with the United States.

2. In failing to hold that the obtaining by an American corporation of the agreements of its principal competitor to abstain from selling military optical instruments to the United States Government clearly involves fraud where such agreement is implemented by the systematic abstention from competitive bidding by such competitor and the making of merely colorable protective bids by such competitor at increased prices fixed by the American corporation.

Reasons for Granting the Writ.

The holding of the circuit court of appeals that the amended complaint must be held to state no cause of action because the acts of the respondents under the unlawful agreements involved no fraud is palpably erroneous.[5]

The arrangement here involved was very simple. Bausch & Lomb and Carl Zeiss of Jena were by far the two largest manufacturers of military optical instruments. To avoid competition with each other and attain the price benefits of a monopoly in the manufacture and sale of military optical instruments, they agreed that Bausch & Lomb should have the exclusive right to sell to the United States Government and that Zeiss should be free of competition from Bausch & Lomb in the sale of such instruments to all other countries. This was more than a mere geographical division. The agreement, so far as Bausch & Lomb was concerned, was aimed directly at the United States Government. The circuit court of appeals concedes that the arrangement between Bausch & Lomb and Zeiss was a "wrong" to the United States, and it cannot be reasonably contended that, to the extent that it resulted in the payment of prices higher than would have been obtained had competition not been thus restrained, the United States was not damaged. The court held, however, that this wrong "was not a 'fraud' unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market." And it held that Bausch & Lomb had made no such representation.

[5] The statement of the court that "the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere" is untenable in law (R. 269). The indictment was for conspiracy, not even requiring proof of an overt act. Damage might or might not be involved. In the instant case, the amended complaint relies on a series of claims which were paid by the United States to its damage by reason of the fact that such claims were based upon prices agreed to as a result of fraud chargeable to Bausch & Lomb.

A. THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORES THE FACTS OF RECORD AND AS A MATTER OF LAW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE OVERWHELMING WEIGHT OF AUTHORITY.

(1) *Misrepresentations of Carl Zeiss are chargeable to Bausch & Lomb.*—In the first place, it is obvious that in holding that Bausch & Lomb had not made fraudulent representations to the United States, the court below has overlooked the responsibility of each conspirator as principal for the acts of the others as his agents. Here the 1921 contract, as supplemented by the two amendments of June and October 1925, required that upon inquiries from the United States, Carl Zeiss should make "protective offers" at an increase over normal price to be named by Bausch & Lomb, but not in excess of a twenty per cent increase. "If the party that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection" (R. 154). Indeed, both the indictment and the complaint in equity alleged that on various occasions subsequent to June 27, 1925 Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss (R. 98, 224).[6] It clearly appears that as late as March,

[6] The continuation of the unlawful agreement expressed in the 1925 modifications of the 1921 contract despite its elimination in form from the 1926 contract is also apparent from the instances cited in the Government's bill of particulars to show that Bausch & Lomb has continued to refuse to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales (R. 97, 121-132). (In 1935 Bausch & Lomb refused contracts with Great Britain and France for $1,500,000 worth of military optical instruments. See Borkin, Germany's Master Plan (1943) pp. 285-286). It also appears from the bill of particulars that Bausch & Lomb has in other instances sold military optical instruments for use outside the United States only after first obtaining the consent of Zeiss as to the sale and the price, the sale in each

1928, long after the purported repudiation of the unlawful agreement, Zeiss, on inquiry from the United States naval attache in Germany, quoted a price on periscopes only after obtaining the consent of Bausch & Lomb to a figure which included ten per cent. payable to Bausch & Lomb (see Exhibit U, R. 188-192). It is, therefore, apparent that such of the facts as may be said to have been before the court by virtue of the references to the indictment and complaint, show conclusively that Zeiss made bids to the United States in furtherance of the conspiracy with Bausch & Lomb. Since these bids were intended to be, and obviously were, mis-

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case being made at an arbitrary, artificial unreasonable and non-competitive price agreed upon with Zeiss (R. 97, 133-136). Exhibits G and H (R. 162-167) referred to in the bill of particulars at R. 134 translate as follows:

Exhibit G:

"The Argentine Naval Commission of this place is interested in buying from one to six altitude meters of 4 meter (base) in accordance with U. S. army specifications, depending on the number they will buy. We intend to ask from $26,000 to $22,000 per piece. Please cable if you are in agreement with this."

Exhibit H:

"As an exception, we agree to the offer at the price mentioned."

Exhibit G1:

"Russia invites offer for altitude meter of 4 meter (base). We propose to offer one instrument at $25,000; 3 instruments at $24,000 each. Cable whether agree."

Exhibit H1:

"We agree to the prices of the 4 meter altitude meters for Russia."

The absence in this correspondence of any reference to the amount of the increase payable over to Zeiss on these sales might be explained by the fact that the supplemental contracts of 1925 state: "The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%" (R. 152, 154). "Normal price" apparently was "the normal price fixed by the firm of Carl Zeiss" (R. 155). The amount of the arbitrary loading of prices in these transactions, therefore, was probably determinable by reference to normal price lists fixed by Carl Zeiss.

representations in furtherance of the conspiracy, they are chargeable to respondent Bausch & Lomb. In holding to the contrary the circuit court of appeals ignored the decisions of this court establishing that in civil, as well as in the criminal law, each member of the conspiracy is constituted the agent of all and every act and declaration in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all. *Connecticut Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

(2) *The allegations of the complaint and the facts of record considered by the trial court clearly show fraud by Bausch & Lomb in the procurement of its contracts with the United States.*—The elimination of Zeiss from competition for United States Government business was effectuated by the following terms of the agreement (R. 151-152, 153-154):

> Carl Zeiss obligates itself not to sell such [military] instruments, directly or indirectly, to the United States, excepting under the following conditions:
>
> In the case of inquiries, received * * * by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. * * * If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection.

It thus appears that the conspiracy contemplated that ordinarily Zeiss should make no offers or bids to the United States. However, arbitrary refusal by Zeiss to bid or quote prices on invitation might give rise to suspicion of a secret

agreement between the companies. Hence it was provided, that upon invitation, Zeiss should make a bid or offer, not bona fide, but at a higher figure named by Bausch & Lomb. It thus appears that the amended complaint and the record before the courts below clearly showed fraudulent misrepresentations of two types:

(a) *Bausch & Lamb through "protective offers" by Zeiss, affirmatively misrepresented that lower Bausch & Lomb bids were reasonable and fair.*—Whenever, upon inquiry, Zeiss made a bid or quoted a price to the United States, such bid was not bona fide but colorable only. There was in this a clearly fraudulent misrepresentation in that the public officials were left with the impression that the amount of the bid submitted by Zeiss represented that company's judgment that the sum so named was not unreasonable. The fraudulent misrepresentation and effect in inducing the belief that the bid of Bausch & Lomb was not unreasonably high is obvious and well-recognized. *McMullen* v. *Hoffman*, 174 U. S. 639, 647; *United States ex rel. Marcus* v. *Hess*, U. S. Sup. Ct., January 18, 1943, p. 4; *In re Salmon*, 145 Fed. 649, 652; see *Hyer* v. *Richmond Traction Company*, 168 U. S. 471, 477. The holding of the court that there is no allegation or showing of fraudulent misrepresentation by Bausch & Lomb is in conflict with these decisions of this court.

This plan of misrepresentation is set out in the allegations that bids by Bausch & Lomb "were at prices that pretended to be and were represented to be, and which the government of the United States and its authorized representatives believed to be the normal, prevailing and competitive prices * * *" (R. 82).

(b) *The "protective offers" made by Zeiss constituted a continuing misrepresentation that Zeiss was unable for economic reasons to compete in sales of military instru-*

ments to the United States.—There is support for the proposition that even when Zeiss, pursuant to the agreement, merely refrained from bidding and Bausch & Lomb obtained government contracts, such contracts are properly to be regarded as having been obtained by fraud. The authorities recognize that where the contractor thwarts the competitive bidding process by conspiracy, there is no difference in the result to the public body whether the fraud is effectuated by colorable or complimentary bids made by other prospective bidders or by their mere failure to bid. In either case, the government is deprived of the benefits of competition which it would otherwise have had, and the fraud upon the public body as the result of the concealed joinder of interest is of equal vice, *City of Oakland* v. *California Construction Co.*, 15 Cal. (2d) 573, 576, 578 (1940); *Jennings County* v. *Verbarg*, 63 Ind. 107, 111; see *Swan* v. *Chorpening*, 20 Cal. 182 (1862).

But it is unnecessary to go so far in the instant case. For it appears that Zeiss was not merely bound negatively to refrain from selling to the United States. Here it was part of the design and plan that the illegal arrangement be affirmatively concealed from the United States by protective bids and, if pressed, by what would amount to protective sales. In furtherance of the expressed purpose of concealment (R. 149), the bids aperiodically submitted by Zeiss upon inquiries from the United States amounted to representations, not only that they were bona fide, but, because under the conspiracy they were required to be up to twenty per cent higher than the normal price, they also amounted to a series of continuing misrepresentations that in truth, in the sale of military instruments in the United States, Zeiss was unable to compete with Bausch & Lomb. The natural and intended tendency then was to suppress the truth and avoid investigations by United States officials which might have earlier disclosed the illegal conspiracy.

By the uniformly higher Zeiss bids submitted over a long period of time, the Government officials were thus led to assume that in instances where Zeiss failed to submit a bid it was not because of conspiracy but because of inability to quote competitive prices through economic reasons.

The tendency of this second misrepresentation to mislead, through what might be called a course of conduct, was plainly equally vicious in that it indicated that the Bausch & Lomb bids were probably fair and reasonable.

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepresentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction. (3 Restatement, Torts, sec. 535).

Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood. *Copper Process Co.* v. *Chicago Bonding & Ins. Co.*, 262 Fed. 66, 73. Benjamin, Sales (7th ed.) p. 462 "The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of materials facts not equally within the knowledge or reach of the plaintiff." *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 388. It is, therefore, submitted that within the meaning of R. S. sec. 5438 the misrepresentations by Carl Zeiss, chargeable to Bausch & Lomb, which clearly aided in concealing the existence of the combination and the thwarting of investigation and inquiry, did constitute fraud. *Tooker* v. *Alston*, 159 Fed. 599, 603.

(3) *The only facts alleged by respondents in their affidavits in no way contradict the basic facts replied upon in the amended complaint and appearing in the record before the court.*—The affidavit of M. Herbert Eisenhart, President of Bausch & Lomb (R. 17-31), was relied upon as a basis for the application for order to show cause why summary judgment should not be entered on the original complaint (R. 11-12). It was also relied upon as a basis for the application for a similar order on the amended complaint (R. 47, 52). A careful reading of this affidavit discloses that aside from conclusions of law, the affidavit is directed almost entirely at the inadvertent charge in the original complaint that Bausch & Lomb was required to include in its bids to the United States an increase of up to twenty per cent over the regular price. This allegation was corrected in the amended complaint and was in any event not essential to show the fraud relied upon. In any event, the amount by which Bausch & Lomb was, under the conspiracy, enabled to increase its prices to the United States obviously goes only to the question of the amount of damages.[7]

The affidavit first points out that Mr. Isseks in the course of the criminal proceedings stated: "* * * there is no charge of fraud against the defendants in connection with the acts complained of in the indictment" (R. 24). This statement was of course accurate. The charge in the indictment was not based on fraud. On the other hand, even if this statement be regarded as a conclusion by Mr. Isseks that respondents had not in fact defrauded the United States, it was merely his individual view of a question of civil liability beyond the scope of his duties and not before

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[7] Whether the consideration for the agreement between the conspirators was the payment by Bausch & Lomb of all or part of the purported royalalties or merely a reciprocal agreement for the exclusive right to sell to the named purchasers was equally immaterial on the question of fraud *vel non*.

the court. The affidavit alleges that "the 1925 amendment to the 1921 agreement was in terms revoked by the 1926 agreement, and, in any event, it had no possible relation to bids by Bausch & Lomb to the United States Government" (R. 27). This statement, of course, merely contradicts the provisions of the agreement itself which was specifically directed at the United States; it also is in conflict with the facts appearing in the bill of particulars (*supra*, pp. 14-15).

The affidavit next denies (R. 27-28) that the agreement included a requirement that Bausch & Lomb inflate its bids to the United States "by 20% or any other amount, to be paid to Carl Zeiss, of Jena, but there was no such inflation of bids". It then asserts: "The price to be charged to the United States Government by Bausch & Lomb on military optical instruments manufactured by it for the Government was decided upon by Bausch & Lomb alone without the participation or consent of any other organization."

This statement does not deny that Bausch & Lomb independently and alone, by virtue of the elimination of Zeiss from competition, was able to increase its price to a figure in excess of that which would have been bid in the presence of competition. Whether this excess was to be paid over to Zeiss or retained in toto by Bausch & Lomb was of course irrelevant so far as fraud and injury to the United States was concerned.

The next pertinent statement is (R. 29):

> At no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party.

This statement falls far short of categorically negativing the making of "protective offers" by Zeiss. However, if

so regarded, it is contradicted by the facts appearing in the bill of particulars (supra, p. 15, note 5; Exhibit U, R. 188-192).

The affiant closes with a sweeping conclusion of law that Bausch & Lomb at no time has submitted any claim upon the Government of the United States which was false, fictitious or fraudulent. The circuit court of appeals did not rely on the allegations of this or any other affidavit, and it is submitted that in their nature they can afford no support for the judgment here.

Since the issues in this case were raised by motion for summary judgment, and since the allegations of fact by the respondents—if they may properly be regarded as even controverting the allegations essential to the charge of fraud contained in the amended complaint—are in any event clearly in conflict with the documents before the court, the granting of summary judgment was clearly erroneous. *Weisser* v. *Mursam Shoe Corporation,* 127 F. 2d 344, 346.

(4) *The amended complaint clearly states a cause of action under R. S. secs. 3490 and 5438.*—Since the amended complaint and the record show that contracts obtained by Bausch & Lomb were obtained by fraudulent means, it necessarily follows that the respondents come within the prohibition of R. S. sec. 5438:

> Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * *

As was held in *United States ex rel. Marcus* v. *Hess,* U. S. Sup. Ct., January 18, 1943, "This fraud did not spend itself with the execution of the contract. * * * The initial

fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded."

B. THE QUESTION INVOLVED IS OF GREAT GENERAL IMPORTANCE.

In its essence, the decision of the circuit court of appeals amounts to no more than a flat holding that one, who by conspiracy procures another to make misleading representations to the United States by way of mere colorable bids and is thereby enabled to increase the amount of his lower and successful bid for the same contract, nevertheless commits no fraud because no representation has been made by him.

Obviously, such a doctrine must adversely affect civil suits by the United States or other public bodies to recover on account of such frauds. With the ever increasing activities of the federal government the result must necessarily be to seriously embarrass criminal prosecutions as well. The concern of the Department of Justice is perhaps indicated by the criticism directed at this decision in the brief amicus filed by the Solicitor General at the request of this Court in *United States ex rel. Marcus* v. *Hess* (No. 173) and *United States ex rel.* v. *New Orleans Chapter, Associated General Contractors of America.* In that brief, referring to the decision of the circuit court of appeals in instant case, the Solicitor General said (p. 45 note):

> However, we think the court erred in limiting the scope of the fraud condemned by 31 U. S. C. 231 to the "accepted sense of deceit". We believe that fraud as used in this statute covers a broader ground than the ancient crime of false pretenses. See *Bradford* v. *United States*, 129 F. (2d) 274 (C. C. A. 5), certiorari denied November 23, 1942, No. 455, this Term; *Pandolfo* v. *United States*, 128 F. (2d) 917 (C. C. A. 10), certiorari denied, October 12, 1942, No. 223, this Term;

United States v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States*, 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States*, 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574.

Regard must also be had for the fact that rulings such as this must seriously influence the Comptroller General in passing upon claims for payment.

Obviously, there is but little deterrent to frauds on the United States if corporations such as those here involved may embark on a course of law violation with possibility of millions in gain at the risk of relatively negligible fines in the maximum amount fixed by the antitrust laws. Here, apparently the company president would treat the criminal indictment and his plea of *nolo contendere* as exonerating from any further liability (R. 24). The present inadequacy of the criminal proceeding even as a deterrent is pointed out in Hamilton, Antitrust in Action, T. N. E. C. Monograph No. 16, pp. 103-104:

> The criminal process results in a verdict of guilt; its satisfaction is a fine. The penalties are always pecuniary, respectable men of business do not go to jail. * * *
>
> A fine of a dime will hardly stop the filching of a dollar; the risk of a $5,000 penalty is not guaranteed to kill off a conspiracy that promises to net five millions. If a legal threat is to deter, the impact of the punishment must be worthy of the crime. * * *
>
> The shift to a civil action improves the weapon. It creates a responsibility alike corporate and personal, makes substantial damages a term in the businessmen's equation, renders it far more certain that the penalty will follow the illegal act, places a deterrent before the breach of the law. In a word, it attempts to make restraint of trade a bad business risk.

Where as here the amended complaint and facts before the court so strongly indicate that the United States has in fact suffered injury to its property interests, the civil sanctions specified by the Congress for the protection of such interests is not lightly to be cut short by summary judgment.

Conclusion.

The question here involved is not merely of interest to the litigants, but rather of great general importance to the United States. It is respectfully submitted, therefore, that there is presented a proper occasion for the exercise of the supervisory power of this Court.

HOMER CUMMINGS,
Counsel for Petitioner.

CUMMINGS & STANLEY,
Of Counsel.

February, 1943.

APPENDIX.

Sections 3490-3493 of the Revised Statutes (12 Stat. 696, 31 U. S. C., Sections 231-234) read as follows:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, whersoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order,

not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person hav-

ing authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."